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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1422

ANGUS J. DePINTO, and JAMES P. DONOHUE, as Trustee in Bankruptcy of the Estate of Angus J. DePinto,
Petitioners,

v.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG, *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESONDENTS IN OPPOSITION

OPINION BELOW

The petition adequately sets forth the opinion below.

JURISDICTION

The first order of the Court of Appeals refusing to disqualify Judge Boldt was entered on November 20, 1963. Thereafter, petitioners filed a cross-petition here on January 31, 1964. No review of the said decision of the Court of Appeals was sought in the cross-petition. On March 23, 1964, the Court denied the cross-petition. Petitioners now request review of the judgment of the Court of Appeals entered on February 24, 1967 and raise only the issue of whether the Court of Appeals erred in refusing to disqualify Judge Boldt. Jurisdiction does not exist.

QUESTIONS PRESENTED

Whether the petition is out of time?

Whether the petitioners failed to raise in the Court of Appeals the question they seek to be considered here?

Whether the question presented in the petition is academic?

STATUTE INVOLVED

The petition adequately sets forth 28 U.S.C. § 144.

STATEMENT

U.S. District Judge George H. Boldt, a visiting district judge from the Western District of Washington, is the trial judge with respect to whom the disputed affidavit of bias and prejudice was directed. (App. A, infra, p. 1a) Judge Boldt heard the instant stockholder's derivative action in the District of Arizona during 1960, 1962 and 1965. (O.T. 379, 1756; R.T. 1)*

The complaint, filed November 4, 1958, asserted breach of fiduciary duty and negligence against thirteen individual defendants, eleven of whom, including petitioner DePinto, were residents of Arizona, and two of whom were residents of Montana. (O.T. 223-225) Four of these defendants, including petitioner DePinto, insisted upon a jury trial; petitioner DePinto also challenged the right of the then plaintiff, John S. Gorsuch (Gorsuch), to maintain the action, claiming that a 1960 merger of the then indispensable party corporate defendant, United Security Life (United), an Arizona stock life insurance

* O.T. refers to the four volume transcript of record containing 1873 pages and bound by blue covers. R.T. refers to the two volume transcript of proceedings containing 605 pages and bound by transparent covers. T.R. refers to transcript of record.

corporation, into respondent Provident Security Life Insurance Company (Provident) caused the trial court to lose its jurisdiction of the case. (O.T. 381-386) The demand of petitioner DePinto for a jury trial was made despite a lengthy pretrial conference order in which he stated that there were no issues of any material fact as to him. (O.T. 261)* Since the arguments were heard on the morning of the date set for trial, Judge Boldt ruled that he would reserve decision on the jury trial issue, and empanel a jury whose verdict would be treated as advisory should he rule, after taking time for consideration of the issue, that the defendants were not entitled to a jury trial. (O.T. 392-393)

The trial commenced and consumed eight days. (O.T. 373, 393, 1289)

After the evidence was in, plaintiff moved for a directed verdict under Rule 50 (b). (O.T. 1271) Judge Boldt denied the motion, but specifically reserved the right to rule later after a verdict was returned. (O.T. 1271). Following return of the verdict, he ruled that the defendants were not entitled to a jury trial in a stockholder's derivative action; and, in the alternative, should it be determined that defendants were entitled to a jury trial, he granted judgment notwithstanding the verdict in accordance with plaintiff's previous motion for directed verdict. (O.T. 310-319) In the latter ruling the trial judge found that the verdicts of the jury were not only "against the weight of the evidence but they are unsupported by any evidence whatever and they are not justified by any legal principle." (O.T. 311) He found that "the evidence overwhelmingly establishes

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* No defense on the merits has ever been made by petitioner DePinto as is shown partly by his damaging admissions in the 103 page pretrial order filed June 11, 1965. (T.R. 91).

without a scintilla of evidence to the contrary, that each and all of the individual defendants, including those above named, were *grossly* negligent in every particular of the duties chargeable to them as corporate directors with respect of the transactions resulting in the loss referred to." (O.T. 315)* Judgment in the sum of $314,794.19 was entered against petitioner DePinto and six other defendants, and $308,000 against five defendants. (O.T. 354) Judgment by default in the sum of $308,000.00 had already been obtained against the thirteenth defendant. (Dck. Entry No. 79 dated January 28, 1960).

Petitioner DePinto and four other defendants appealed, claiming, among other things, that they had been entitled to a jury trial and that the 1960 merger of United into Provident took away the district court's jurisdiction to hear the case. (Opening Brief of Appellant DePinto, No. 17114, p.36-46) Plaintiff responded directly to the jury argument, and also argued that the motion for a directed verdict was properly granted making the question of whether defendants were entitled to a jury trial irrelevant. (Opening Brief of Appellee Gorsuch, No. 17114, p. 33-37) The only reply thereto was from petitioner DePinto who merely said "the undisputed facts, in the light of applicable legal principles compels a judgment" for him. (Reply Brief of Appellant DePinto, No. 17114, p.12)

In 1961 the Court of Appeals reversed *solely* on the ground that the merger had deprived Gorsuch of his right to sue and United of its right to be sued, and

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* The Court of Appeals, in its third opinion, which affirmed the third consecutive $314,794.19 judgment against petitioner DePinto, referred to the transaction as a "fraudulent scheme." (Pet., p. 11a)

remanded the case to Judge Boldt to provide an opportunity for Provident to join or be joined.* 295 F.2d 909. It also said:

> "If, upon remand the district court concludes that the parties are reconstituted and realigned in such manner as to cure the difficulty caused by United's merger with Provident, it would then be *in its discretion* whether the case *should be reopened* for the taking of further evidence and the submission of additional argument on the merits. Based on the original record herein and upon such further proceedings *as to the trial court may seem appropriate*, substituted or supplementary findings of fact and conclusions of law may be entered, followed by judgment - - -" (O. T. 1428-1429) (Emphasis supplied)

In addition, the Court of Appeals directed the trial judge to make further "findings of fact on several matters of importance." (O.T. 1429)

Upon remand, in 1962, Judge Boldt used his discretion to give all parties an opportunity to put on "any evidence" each considered appropriate under the Court of Appeals decision. (O.T. 1761, 1764-1765, 1796) He held pretrial conferences, heard oral argument on numerous motions and received evidence with respect thereto, and conducted a further hearing on the case at which evidence was received.** (O.T. 1494-1562, 1633-1635, 1756-1819) At the beginning of the hearing petitioner

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* Petitioners' statement of the case that this reversal was "*Principally* on the ground of the consequences of a certain merger" is therefore not accurate. (Pet., p. 4)

** The Court can judge, in light of the quoted portions of the opinion of the Court of Appeals and the willingness of Judge Boldt to accept any evidence tendered by the parties, the accuracy of petitioners' statement of the case that the "trial court, instead of allowing the matter to be tried, merely readopted its original findings of fact and reaffirmed his earlier decisions." (Pet., p. 5)

DePinto renewed his motion "for judgment based on the original jury verdict, and in the alternative, for a jury trial." (O.T. 1796) After supplementary findings of fact and supplementary conclusions of law were filed by Judge Boldt (O.T. 1712-1745), a second judgment in the sum of $314,794.19 was entered against petitioner DePinto and the four other defendants, none of whom had offered any evidence on the merits. (O.T. 1746-1749, 1815-1816, 1796-1819)

Petitioner DePinto and the remaining four defendants again appealed. The Court of Appeals, in 1963, then reversed Judge Boldt on the grounds that such defendants had been entitled to a jury trial in 1960, and that under the Seventh Amendment a district judge lacks the power to grant a motion for a directed verdict for a plaintiff under Rule 50 (b) in an amount in excess of the jury's subsequent verdict. 323 F.2d 826. The Court of Appeals did not review the evidence to find out whether the district court had erred in its 1960 finding that there was no genuine factual issue as to petitioner DePinto's liability and as to the amount of the damages. It then remanded the case to the district court for a new trial before a jury.

After the second opinion of the Court of Appeals was entered on October 31, 1963, petitioner DePinto filed a petition for a rehearing in which he also moved the Court of Appeals to disqualify Judge Boldt on the ground that the latter had made adverse rulings which had been reversed twice. (App. B, infra, p. 10a) The petition to disqualify was denied on November 20, 1963. (App. C, infra, p. 15a) Thereafter, in 1964, respondent Doig filed a petition for a writ of certiorari with respect to the jury trial and Rule 50(b) decision of the Court of Appeals (Provident Security Life Insurance Company,

et al. v. Angus J. DePinto, et al., October Term, 1963, No. 709), and on January 31, 1964, the petitioner DePinto filed a cross-petition. No review was sought in such cross-petition of the denial by the Court of Appeals of petitioner DePinto's petition to disqualify Judge Boldt. On March 23, 1964, this Court denied both the petition for a writ of certiorari and the cross-petition. 376 U.S. 950.

Subsequently, after remand to the district court, and while a motion by plaintiff for partial summary judgment as to liability only was pending, petitioner DePinto filed the subject affidavit of bias and prejudice against Judge Boldt. (App. A, infra, p. 1a) The motions with respect to the affidavit were assigned to U.S. District Judge Carl A. Muecke in the District of Arizona. Judge Muecke held a hearing, and ruled adversely to petitioner DePinto (App. D, infra, p. 16a) Later Judge Boldt denied plaintiff's motion for partial summary judgment as to liability only, and ordered the case tried to a jury.

In 1965, after a 103 page pretrial order had been agreed upon by the remaining defendants and plaintiff two weeks prior to the trial (R.T. 127-128), petitioner DePinto and the other four defendants refused to sign the order in its entirety a day before the trial was scheduled to begin. (R.T. 122-125, 128-129) Several minutes later, petitioner DePinto conceded that the only portion thereof which he disputed was the last paragraph. (R.T. 129) His counsel then signed the order.* (T.R. 91)

*The Court can judge, in light of the refusal to sign the order after it had been agreed on several weeks earlier and the full discussion between the trial court and the counsel for all parties cited above, the accuracy of the footnote statement in the petition that in "connection with settling the pretrial order, counsel for petitioner refused to agree to a *certain matter*" followed by the quoted remarks of Judge Boldt. (Pet., p. 7)

The case was then tried to a jury.

Among the many instructions given to the jury, to which no objection was made by petitioner DePinto, was the following:

> "The claimed items and amounts of assets transferred to Kelly consist of cash by check or bank certificates of deposit in the sum of $166,498.66; second, promissory notes and accrued interest thereon, totaling $87,626.88, and third, mortgages, bonds, and accrued interest thereon in the amount of $60,668.65." (R.T. 587)

Within an hour and a quarter after the jury retired, it sent the following question to Judge Boldt:

> "If the jury find in favor of the Plaintiff, is Dr. DePinto responsible for the full amount or whatever the jury specifies?" (T.R. 236, 292)

Thereupon, Judge Boldt consulted with and obtained the approval of counsel for plaintiff and petitioner DePinto to the following answer:

> "The full amount of damages sustained as found by the jury." (T.R. 293)

Later the jury sent the following communication to the district judge:

> "1. Jury wishes a repeat of the 3 factors to be used in judging *for* the plaintiffs." (T.R. 237) (Emphasis supplied)

Thereafter, the answer to be given was discussed and approved by counsel for plaintiff and petitioner DePinto, and was as follows:

> "Answering your first inquiry:
>
> The three (3) ultimate issues are:
>
> 1) Was defendant DePinto negligent in performing

his fiduciary duties in one or more of the particulars asserted by plaintiffs? If so,

2) Did such negligence of defendant DePinto proximately cause or contribute to causing loss or damage to United Security Life? If so,

3) What was the amount of such loss or damage?

The three items of claimed damage are:

1) Cash, by check or bank certificates of deposit—	$166,498.66
2) Promissory notes and accrued interest thereon—	87,626.88
3) Mortgages, bonds and accrued interest thereon—	60,668.65
Total—	$314,794.19"

(T.R. 238)

When the general verdict of the jury in the sum of $314,794.19 was returned, petitioner DePinto's counsel was in the courtroom, and made no statement or objection respecting either answer of the trial court to the jury. In a later memorandum in support of a motion for judgment in accordance with motion for directed verdict filed in the district court, petitioner DePinto's counsel conceded with respect to the second answer that he had "indicated to the Court that it would be *all right* to mention the three factors—negligence, proximate cause and damages, *and also the items of claimed damages.*"*

Judge Boldt entered the third consecutive $314,794.19 judgment against petitioner DePinto in accordance with the general verdict of the jury on June 28, 1965. (T.R. 235, 262) Since petitioner DePinto and plaintiff had agreed that the issue of from what date interest should

* Is it accurate for petitioners to say, with respect to this second answer to the jury, that Judge Boldt "*gratuitously* amplified the damage issue? (Pet., p. 7)

run was to be decided by the district court, Judge Boldt ruled with respect thereto and awarded interest from the date of United's loss on October 18, 1957. (T.R. 91, 168, 257) He relied on *Miller v. Robertson*, 266 U.S. 258 (1924) and *Concordia Ins. Co. v. School Dist. No. 98*, 282 U.S. 545 (1931). (T.R. 257)

Petitioner DePinto appealed. Thereafter James P. Donohue, Trustee in Bankruptcy of the Estate of Angus J. DePinto, was allowed to intervene. The Court of Appeals affirmed the judgment but disallowed interest prior to June 28, 1965. 374 F.2d 37. In affirming the judgment it discussed at length and rejected petitioners' arguments concerning the trial judge's answer to the jury's second question. (Pet., App. A, p.18a-19a) Petitioners' application for a rehearing was denied on March 29, 1967.

ARGUMENT

Petitioners have: (1) first *assumed* that the courts below relied on the principle that in the federal practice there can be no bias developing from a pattern of rulings and from repeated reversals, (2) expressly asked the Court "not to immerse itself in the facts to determine whether or not the trial judge should have been disqualified", and (3) then requested the Court to "affirm the principle that reversed adverse rulings can, under appropriate circumstances, constitute the basis for an effective affidavit of bias and prejudice." (Pet. p. 9, 15)

1. Petitioners' Application For A Writ Of Certiorari Is Out Of Time.

The question raised in the petition is presented three years and four months too late. The second opinion and

judgment of the Court of Appeals was entered on October 1, 1963. 323 F.2d 826. Petitioner DePinto filed a petition for rehearing on or before October 29, 1963, in which he moved the Court of Appeals to disqualify Judge Boldt from proceeding further on the ground that the latter had made rulings adverse to petitioner DePinto and had been reversed twice. (App. B, infra, p. 10a) The petition was denied on November 20, 1963. (App. C, infra, p. 15a) Thereafter, in 1964, respondent Doig filed a petition for a writ of certiorari here (Provident Security Life Insurance Company, et al. v. Angus J. DePinto, et al., October Term, 1963, No. 709), and on January 31, 1964, the petitioner DePinto filed a cross-petition. No review was sought in such cross-petition of the denial by the Court of Appeals of petitioner DePinto's petition to disqualify Judge Boldt. Having raised on appeal in 1963 the question of disqualification of Judge Boldt for bias, petitioner DePinto could not raise the question again after the case was thereafter remanded for a new trial. *Peckham v. Ronrico Corp.*, 288 F.2d 841, 843 (1st Cir. 1961). Thus, it was incumbent upon petitioner DePinto to assert in his 1964 cross-petition here any alleged error respecting the denial by the Court of Appeals of his petition to disqualify Judge Boldt in order to avoid the finality of said order. On March 23, 1964, this Court denied both the petition and the cross-petition. 376 U.S. 950. On November 20, 1964, petitioner DePinto filed the disputed affidavit (App. A, infra, p. 1a) Thus, petitioner's application for a writ of certiorari is out of time and should be denied.

2. Petitioners Did Not Raise In The Court Of Appeals The Only Question Sought To Be Considered Here.

The question raised in the petition was not raised in

the Court of Appeals. There the petitioners argued merely that the affidavit was timely, and that:

> "We submit that, under the provisions of 28 U.S.C.A. § 144, the filing of the Affidavit of Bias or Prejudice deprived Judge Boldt of all right, power or authority to take any further action in the case. So far as DePinto is concerned, it is *immaterial* why such bias developed or *how it is demonstrated* . . . " (Opening Brief of petitioners in C.A. 9 at p. 65, No. 20553) (Emphasis supplied)

That is, petitioners contended in the Court of Appeals that the *mere filing* of a Section 144 affidavit of bias and prejudice disqualifies a district judge. Therefore, having failed to present to the Court of Appeals the question raised in the petition here, the petitioners are precluded from doing so now. *California v. Taylor*, 353 U.S. 553, 556-557, n. 2 (1957)

3. The Instant Case Does Not Raise The Question Of Whether Reversed Rulings Can Under Appropriate Circumstances Constitute The Basis Of An Effective Affidavit Of Bias And Prejudice, And, If It Did, The Reversed Rulings Here Would Not Support A Finding Of Bias Based Thereon.

The foundation on which the entire petition rests is the incorrect statement that the "courts below have operated on the assumption that in the federal practice there can be no bias developing from a pattern of rulings and from repeated reversals." (Pet., p. 9). Thereupon petitioners ask for a review of this "assumption," and suggest there is a conflict among the courts of appeals with respect thereto.

However, Judge Muecke, to whom the hearing on the affidavit to disqualify Judge Boldt was assigned, ex-

pressly disavowed that his decision was based on such a rule. (App. D, infra, p. 16a) Instead, he ruled that the affidavit was not sufficient for the *reasons* that it: (1) failed to show facts to indicate personal bias, (2) was untimely, and (3) had in substance already been denied by the Court of Appeals. (App. D, infra, p. 16a) Thereafter, petitioners contended in the Court of Appeals, in both their briefs and specifications of error, *only* that the mere fact of filing the affidavit disqualified Judge Boldt and that it had been timely filed. Not a single sentence was advanced to the Court of Appeals claiming that there can be bias developing from a series of reversed rulings. Consequently, the Court of Appeals did not rule, was not required to rule, and did not operate on the assumption that in federal practice there can be no bias developing from a series of reversed rulings. That being the case, the decision of the Court of Appeals can be in conflict neither with a decision of another circuit on the matter of whether bias can be based on a pattern of reversed rulings nor with the principles or reasoning thereof. It also follows that this case cannot raise the "important" and "unsettled" question of law which petitioners desire resolved.

A second reason why petitioners seek only an academic discussion of the law respecting whether there can be legally sufficient bias developing from reversed adverse rulings is shown by their statement that:

> "We do not ask this Court to immerse itself in the facts to determine whether or not the trial judge should have been disqualified." (Pet., p. 9)

Such statement, along with the failure of the petition to enlighten the Court respecting the specifics of the reversed rulings, constitutes a request that the Court order the Court of Appeals to hold a hearing without

first being satisfied that there are some reasonable grounds to believe that the particular reversed rulings would support a finding that Judge Boldt was biased. Yet even a cursory examination of those reversed rulings compels the conclusion that the Court of Appeals could never decide that they showed bias by Judge Boldt.

The first reversed ruling of Judge Boldt, made in 1960, was directed to petitioner DePinto's contention that the then plaintiff, Gorsuch, no longer had the capacity to maintain the action because the indispensable party corporate defendant, United, had been merged into respondent Provident a year or two after the trial court had acquired jurisdiction. Plaintiff contended that the merger had been brought about by the defendants, and that since the trial court's jurisdiction depends upon the state of things at the time the action was brought, its jurisdicion cannot be ousted by subsequent events. See *Mollan v. Torrance*, 9 Wheat. 537. Judge Boldt sustained plaintiff. The Court of Appeals, in 1961, held, without ruling on the merits of the case, that upon completion of the merger, Gorsuch lost his capacity to sue and United its capacity to be sued, and remanded the case to Judge Boldt to afford an opportunity for Provident to join or be joined. It also specifically directed Judge Boldt to make *further "findings of fact* on several matters of importance." 295 F.2d 909. Is it likely that any court of appeals would so remand a matter and at the same time be able to conclude that the trial judge's ruling showed bias?

The second reversed ruling of Judge Boldt, also made by him in 1960, was that the parties are not entitled to a Seventh Amendment jury trial in a stockholder's derivative action, and that by reserving decision under Rule

50 (b) on a plaintiff's motion for directed verdict, a district court has the power to enter judgment notwithstanding the verdict in plaintiff's favor in an amount in excess of the jury verdict. The Court of Appeals, in 1963, after it had remanded the case to Judge Boldt in 1961 for further findings of fact, reversed and held for the first time in this country that the parties are entitled to a jury trial in a stockholder's derivative action. 323 F.2d 826. It also held, without reviewing the evidence, that the Seventh Amendment forbids a district court from entering judgment notwithstanding the verdict under Rule 50 (b) in an amount in excess of the jury verdict. The 1964 petition for a writ of certiorari with respect to such rulings was then filed here with Professor James Wm. Moore appearing on behalf of plaintiff. In 1965 a Yale Law Journal Note concluded that the said jury trial decision of the Court of Appeals herein was a "striking misapplication" and "unwarranted extension of the seventh amendment." See Note, The Right To A Jury Trial In A Stockholder's Derivative Action, 74 Yale L.J. 725 (1965). Could it be found that these two reversed rulings of Judge Boldt were so "erroneous" as to support a finding that he was biased against petitioners? Professor Moore did not think they were erroneous rulings at all.

The third reversed ruling of Judge Boldt,* made in 1965 at the third trial, and which ruling is now pending here,** cited *Miller v. Robertson*, 266 U.S. 258 (1924) and *Concordia Ins. Co. v. School Dist. No. 98*, 282 U.S.

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* The relevance of such third reversed ruling to the question presented is difficult to discern, but it has been referred to in the petition at p. 9.

** Provident Security Life Insurance Company, et al. v. Angus J. DePinto, et al., October term, 1966, No. 1406.

545 (1931), as authority. It was that in the absence of an authoritative state decision to the contrary, the district court, even in a case of unliquidated damages, can, in the exercise of a sound discretion, include interest as an element of damages when necessary in order to arrive at fair compensation. The Court of Appeals reversed, relying on what it *thought* the Arizona Supreme Court *would* apply as the rule with respect to the kind of claim made against petitioner DePinto. 374 F.2d 37. The pending petition shows that the Court of Appeals was forced to make a judgment as to what it thought the Arizona Supreme Court *would* rule because it too could find no authoritative Arizona decision *to the contrary*, and therefore it contravened *Miller v. Robertson, supra*, and *Concordia Ins. Co. v. School Dist. No. 98, supra*. Was this ruling by Judge Boldt so erroneous that it would support a finding that he was biased?

4. The Question Presented In The Petition Is Not Unsettled.

The question presented by the petition, irrelevant as it is in the context of this case, is not unsettled. A long line of cases have established the principle that reversed adverse rulings cannot constitute the basis for disqualification of a district judge under 28 U.S.C. § 144. *United States v. Grinnell Corporation*, 384 U.S. 563, 583 (1966); *Berger v. United States*, 255 U.S. 22, 33-34 (1922); *Ex parte American Steel Barrel Co.*, 230 U.S. 35 (1913); *Lyons v. United States*, 325 F.2d 370, 375 (9th Cir. 1963), cert. den, 377 U.S. 969; *Deitle v. United States*, 302 F.2d 116, 118 (7th Cir. 1962); *Martin v. United States*, 285 F.2d 150, 151 (10th Cir. 1960), cert. den. 365 U.S. 853; *Gallarelli v. United States*, 260 F.2d 259 (1st Cir. 1958); *United States v. Garden Homes*, 113 F. Supp. 415 (D.C. N.H.), affirmed per curiam, 210 F.2d 281 (1st Cir. 1954);

United States v. 16,000 Acres of Land, 40 F. Supp. 645 (D.C. Kan.).

Petitioners have cited no cases contra.

5. There Is No Conflict Between The Claimed Principle Of The Decision Below And The Decisions Cited By Petitioners As Being In Conflict Therewith.

Assuming that the underlying principle of the decision below were that there can be no bias developing from a series of reversed rulings, the three cases cited by petitioners are not in conflict therewith. In none of said cases, *Knapp v. Kinsey*, 232 F.2d 458 (6th Cir. 1956); *United States v. Ritter*, 273 F.2d 30 (10th Cir. 1959) and *United States v. Drumm*, 329 F.2d 109 (1st Cir. 1964), was the disqualification of the trial judge from further proceeding in the matter upon remand predicated upon a finding of bias and prejudice based on reversed adverse rulings of the trial judge. In all of the said cases, the court of appeals' conclusion that the trial judge had been biased and prejudiced was based upon his conduct and/or remarks made during the trial, or the manner in which he had questioned witnesses. That is, it was specific conduct of the trial judge during the proceedings which caused the court of appeals to conclude he had been biased and prejudiced. Indeed *Knapp v. Kinsey*, *supra*, cited with approval the rule that "Adverse rulings during the course of the proceedings are not by themselves sufficient to establish bias and prejudice." Thus, petitioners have overlooked the distinction between a case in which bias is based on reversed adverse rulings and one in which it is based upon the conduct or remarks of the trial judge. A decision based on the former ground cannot be said to be in conflict with

decisions based upon the latter ground. In addition none of the cases cited by petitioners involved an affidavit filed under 28 U.S.C. § 144.

6. The Court Should Not Override The 1948 Decision Of Congress Not To Change The Law.

When Congress, in 1948, redrafted Judicial Code § 21, 28 USCA § 25, 7 FCA title 28, § 25, and enacted 28 U.S.C. § 144, the then-existing law provided: "The alleged bias and prejudice to be disqualifying must stem from an extra-judicial source and, therefore, adverse rulings during the course of the proceedings are not sufficient to establish bias and prejudice." *Berger v. United States,* 255 U.S. 22 (1922). Since Congress did not change the substance of the predecessor to 28 U.S.C. § 144 or the interpretation which had been placed upon it by the courts, it must be concluded that it acquiesced in the judicial construction thereof. *Cammarano v. United States,* 358 U.S. 498 (1959); *United States v. Ryan,* 284 U.S. 167 (1931). The Court should not override the decision of Congress to re-enact the then-existing law substantially unchanged. *Hanover Bank v. Commissioner,* 369 U.S. 672 (1962). Nor may petitioners avoid this rule by classifying the hypothetical question presented in the petition as "a matter of practice and procedure." (Pet., p. 18).

7. The Rule That Reversed Rulings Cannot Support An Affidavit Of Bias And Prejudice Under 28 U.S.C. § 144 Should Not Be Changed.

28 U.S.C. § 144 permits a party to effect the disqualification of a district judge upon the filing of a "timely" and "sufficient" affidavit that the judge has a "personal bias" either against him or in favor of an adverse party.

The term "personal" excludes official or judicial, and probably explains why this Court said in 1966 that the bias "must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corporation,* 384 U.S. 563 (1966). The rule petitioners seek would contradict the language of the statute, and encourage more attacks upon district judges such as those found in the petition.

Petitioners have made an extremely unfair attack upon the integrity and good judgment of Judge Boldt through the indirect methods of footnotes,* innuendo, omission, misstatement, and finally by the erroneous statement, at pages 17 and 18, without citation to any part of the record, that some of Judge Boldt's comments are close to his having publicly attacked petitioner DePinto's personal honor and integrity. More of this kind of attack can be expected from losing litigants once the doors are opened by a rule requiring hearings on whether a series of reversed adverse rulings plus "appropriate circumstances" disqualify a district judge.

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* One of these footnote supports for petitioners' claim of bias here is actually another lawsuit in which neither of the petitioners was a party. Provident Security Life Insurance Co. v. Gorsuch, 323 F. 2d 839 (9th Cir. 1963). (Pet., p. 5) Another footnote support is an extremely misleading account of Judge Boldt's comments in 1960 to counsel for another party. (Pet., p. 4) (See O.T. 1211-1215 showing that counsel for the defendant Niesz had violated a clear ruling, observed by all other counsel, not to refer to the merger before the jury)

CONCLUSION

The decision below is correct. There is no conflict of decision and no other reason for review by this Court. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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